# Guideline Sentencing Update

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## Offense Conduct

### Mandatory Minimums and Other Issues

**Seventh Circuit holds that defendant may receive § 2D1.1(b)(6) reduction even if § 3E1.1 reduction is denied.** Under USSG § 2D1.1(b)(6) (formerly § 2D1.1(b)(4)), drug defendants whose offense level is 26 or above can qualify for a two-level reduction if they satisfy the requirements of subdivisions (1)–(5) of the "safety valve" provision, § 5C1.2. In this case, the district court denied defendant an acceptance of responsibility reduction because he had failed to appear for his plea hearing, finally turning himself in seven months later, and did not fully admit his criminal conduct until the sentencing hearing. However, because defendant did finally admit his conduct, the court concluded that he met the requirements of § 5C1.2 and thereby qualified for the two-level reduction under § 2D1.1(b)(6). Defendant appealed, claiming it was inconsistent to deny the § 3E1.1 reduction while granting the § 2D1.1(b)(6) reduction.

The appellate court affirmed. Subdivision (5) of § 5C1.2 requires that, "not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense." "Section 5C1.2(5) in one respect demands more of an effort from the defendant than § 3E1.1(a), . . . but in other respects may demand less. Under § 5C1.2(5), the defendant is required to provide the necessary information 'not later than the time of the sentencing hearing.' U.S.S.G. § 5C1.2(5). In contrast, the commentary to § 3E1.1 advises the district court that it may consider whether the defendant provided information in a timely manner. . . . Likewise, the commentary to § 3E1.1 points to prompt and voluntary surrender and voluntary termination of criminal conduct as factors for consideration, while neither the text nor commentary for § 5C1.2 highlights such factors. Assuming that the district court in Webb's case appropriately awarded a § 5C1.2 reduction, it was nevertheless permitted to refuse a § 3E1.1(a) reduction."

*U.S. v. Webb*, 110 F.3d 444, 447–48 (7th Cir. 1997). *Cf. U.S. v. Mertilus*, 111 F.3d 870, 874 (11th Cir. 1997) (per curiam) (remanded: although § 2D1.1(b)(6) uses the factors listed in § 5C1.2, the two sections operate independently and it was error not to consider § 2D1.1(b)(6) reduction because offense of conviction is not listed in § 5C1.2 as eligible for safety valve). *See also U.S. v. Osei*, 107 F.3d 101, 102–05 (2d Cir. 1997) [9 *GSU* #6].

To be included in *Outline* at II.A.3; see also V.F.2

## Determining the Sentence

### Safety Valve Provision

**Sixth Circuit holds that safety valve may be applied to defendant whose appeal was pending on provision's date of enactment.** Defendant was originally sentenced in 1991 to 121 months on an LSD charge. On appeal, the appellate court remanded for clarification of a plea withdrawal issue, and the district court imposed the same sentence on remand. After a Nov. 1993 amendment changed the guideline for calculation of LSD amounts, defendant filed a motion for sentence modification under 18 U.S.C. § 3582(c). Although the district court granted her motion, it held that she was still subject to a 10-year mandatory minimum sentence and imposed a modified sentence of 120 months. One month after this sentence, on Sept. 23, 1994, the safety valve statute took effect, 18 U.S.C. § 3553(f); USSG § 5C1.2. Defendant appealed her sentence, claiming she should be resentenced under the safety valve provision.

"The question before us is whether § 3553(f) of the safety valve statute should be applied to cases pending on appeal when it was enacted. This subsection applies 'to all sentences imposed on or after' [10 days after] the date of enactment . . . . The statute's language does not address the question of its application to cases pending on appeal. The statute's purpose statement, however, suggests that it should receive broad application and should apply to cases pending on appeal when the statute was enacted."

"A case is not yet final when it is pending on appeal. The initial sentence has not been finally 'imposed' within the meaning of the safety valve statute because it is the function of the appellate court to make it final after review or see that the sentence is changed if in error. When a sentence is modified under 18 U.S.C. § 3582(c)(2), the courts are required to consider the factors that are set out in 18 U.S.C. § 3553(a). . . . The consideration of these factors is consistent with the application of the safety valve statute. Therefore, § 3553(a) authorizes consideration of the safety valve statute when a defendant is otherwise properly resentenced under § 3582(c)(2)."

The court also concluded that its holding is consistent with §§ 3553(a) and 3582(b)(2)–(3), "which indicate that a sentence is not final if it can be appealed and modified pursuant to 18 U.S.C. § 3742. Similarly, § 3582(b)(1) indicates that a sentence is not final if it can be modified pursuant to 18 U.S.C. § 3582(c). In each of these situations resentencing is possible because of an exception to the

general rule that the initial sentence was final. Each situation raises the possibility that resentencing will lower the defendant's unrestricted guideline range below the statutory minimum, thus making consideration of the safety valve relevant. Therefore, we hold that appellate courts may take the safety valve statute into account in pending sentencing cases and that district courts may consider the safety valve statute when a case is remanded under § 3742 or § 3582(c), the Sentencing Guidelines or other relevant standards providing for the revision of sentences."

*U.S. v. Clark*, 110 F.3d 15, 17–18 (6th Cir. 1997). *See also U.S. v. Mihm*, 134 F.3d 1353, 1355 (8th Cir. 1998) ("[T]he § 3553(f) safety valve is a general sentencing consideration that the district court must take into account in exercising its present discretion to resentence under § 3582(c)(2). . . . [T]he grant of § 3582(c)(2) relief to Mihm is a distinct sentencing exercise, one that results in a sentence 'imposed on or after' September 23, 1994. Thus, there is no retroactivity bar to applying § 3553(f) in these circumstances."). *Contra U.S. v. Stockdale*, 129 F.3d 1066, 1068 (9th Cir. 1997) ("A person whose sentence is reduced pursuant to the change in the weight equivalencies is not entitled to retroactive application of the safety valve statute, whether his original sentence was pursuant to a guideline range or the statutory minimum. Both the language of the applicable provisions and their purposes require this result.") (note: order was amended on denial of rehearing and rehearing en banc, April 20, 1998); *U.S. v. Torres*, 99 F.3d 360, 362–63 (10th Cir. 1996) (do not apply to defendant originally sentenced in 1993 who was resentenced under § 3582(c) after retroactive amendment changed guideline calculation of marijuana plants).

See *Outline* at V.F.1

**Ninth Circuit holds that adverse jury finding does not preclude safety valve reduction.** Defendant claimed to have no knowledge that a suitcase he had been asked to transport contained heroin. However, the jury found him guilty of possession of heroin with intent to distribute and of importation of heroin. At sentencing, the district court found that defendant had told the government everything he knew about the offenses and reduced his sentence under the safety valve provision, § 3553(f); § 5C1.2. The government argued that, because knowledge of the drugs is an element of the convicted offenses, the jury's guilty verdict precludes a finding that defendant "truthfully provided" information as required under § 3553(f)(5); § 5C1.2(5).

The appellate court affirmed the sentence, holding that recent Supreme Court cases make it clear that sentencing findings do not have to agree with a jury verdict. In *Koon v. U.S.*, 116 S. Ct. 2035 (1996), "the Supreme Court made it clear that courts may not define facts relevant to sentencing beyond those identified in the guidelines," and "reflect[ed] the long-standing tradition that sentencing is the province of the judge, not the jury. . . . In light of the Court's decision in *Koon*, we have no difficulty holding that a district court may reconsider facts necessary to the jury verdict in determining whether to apply the safety valve provision of the guidelines."

The court found further support in *U.S. v. Watts*, 117 S. Ct. 633 (1997), which held that "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge." In reversing Ninth Circuit precedent, the Court also stated that "the jury cannot be said to have 'necessarily rejected' any facts when it returns a general verdict of not guilty." The appellate court thus held that, "[c]onsistent with the language of § 3553(f) and the different roles involved when determining guilt and imposing sentence, . . . the safety valve requires a separate judicial determination of compliance which need not be consistent with a jury's findings." Because the district court's conclusion here was not clearly erroneous, the sentence was affirmed.

*U.S. v. Sherpa*, 110 F.3d 656, 661–62 (9th Cir. 1996) (amending 97 F.3d 1239).

See *Outline* generally at V.F.2

## Supervised Release

**Sixth Circuit holds that period of supervised release may be tolled while defendant is out of country after deportation.** In 1992 defendant pled guilty to immigration fraud. He was sentenced to three months of imprisonment to be followed by two years of supervised release. As special conditions of supervised release, defendant was to agree to voluntary deportation, was not to reenter the United States without written permission of the Attorney General, and, if allowed to reenter, would report to the nearest probation office so that his period of supervised release "shall be resumed." Defendant served his sentence and was deported. Within a year he returned to the United States illegally and was eventually arrested in 1996. The original district court revoked defendant's supervised release and sentenced him to 24 months in prison, rejecting defendant's arguments that the court had no authority to toll his period of release and therefore that period had expired in 1995.

The appellate court affirmed the revocation and sentence, concluding that tolling a period of supervised release is allowed under the "broad discretion to fashion appropriate conditions of supervised release" granted to district courts under USSG § 5D1.3 and 18 U.S.C. § 3583(d). "We think that the tolling order met the specified criteria [in § 5D1.3]. Mr. Isong had repeatedly violated immigration laws, and he had flagrantly violated his original sentence within months of its entry. Given his demonstrated disrespect for the law, it seems to us that the tolling order was an appropriate penological measure, designed to ensure that the defendant would be subject to supervi-

sion if and when he returned to the United States. The tolling order was also appropriate from a deterrence standpoint. It is unlikely that Mr. Isong could have been supervised after his deportation to Nigeria. Supervised release without supervision is not much of a deterrent to further criminal conduct."

The court also rejected defendant's argument that, because 18 U.S.C. § 3624(e) specifically provides for tolling a period of supervised release if a defendant is imprisoned for another crime for 30 days or more, the lack of any comparable tolling provision for a deported defendant impliedly forbids such an order. The argument "is blunted here by the rest of the statutory scheme. When deportation is part of a defendant's sentence, the deportation normally occurs upon the end of any term of imprisonment. An unserved period of supervised release does not defer deportation. 8 U.S.C. § 1252(h). In most instances, supervised release of a defendant who is outside the United States would be essentially meaningless. It seems to us that a tolling order is an appropriate way to make supervised release meaningful for defendants who are going to be deported. This circumstance, coupled with the district court's discretion to set appropriate conditions of supervised release . . . , is sufficient to counter any negative implication that might otherwise stem from 18 U.S.C. § 3624(e)."

*U.S. v. Isong*, 111 F.3d 428, 429–31 (7th Cir. 1997) (Moore, J., dissented). *See also U.S. v. (Mary) Isong*, 111 F.3d 41, 42 (6th Cir. 1997) (affirming condition of supervised release that defendant remain under supervision for three years, not including any time she is not in the country if she is deported).

See *Outline* generally at V.C

**First Circuit holds that supervised release begins on date of actual release from prison, not date prisoner would have been released had he not been convicted of charge that was later dismissed.** Defendant was sentenced in 1991 to two concurrent terms of 21 months each plus a consecutive term of 60 months for a third count of using a firearm during a drug offense, 18 U.S.C. § 924(c). He also received concurrent supervised release terms of three and five years on the first two counts. In early 1996, defendant filed a motion under 28 U.S.C. § 2255 seeking to have his § 924(c) conviction vacated on the basis of *Bailey v. U.S.*, 116 S. Ct. 501 (1995). His motion was granted and the conviction and sentence were vacated and the count was dismissed. Because the remaining valid sentences had long been completed, the court ordered defendant's immediate release and commencement of the terms of supervised release. Defendant appealed, arguing that his supervised release terms should be reduced by the time he was imprisoned (approximately 39 months) beyond the date the two valid sentences would have ended. Alternatively, he requested that the supervised release terms be eliminated altogether to compensate him for the deprivation of freedom that resulted from the vacated conviction and sentence.

The court rejected defendant's arguments, and specifically disagreed with the rationale of *U.S. v. Blake*, 88 F.3d 824, 825–26 (9th Cir. 1996) (when retroactive guideline amendment reduces prison term to less than time served, term of supervised release begins on date defendant should have been released) [9 *GSU* #1]. Defendant's arguments are "contrary to the language of 18 U.S.C. § 3624[(e)]," which states that a "term of supervised release commences on the day the person is released from imprisonment" and "does not run during any period in which the person is imprisoned in connection with a conviction for a Federal, State, or local crime." Defendant can reasonably argue that, because he should have been released from prison in late 1992 and his term of release begun at that time, he should be given credit for his excess prison time by reducing his time on release. However, "[t]he fact remains that § 3624(e) ties the beginning of a term of supervised release to release from imprisonment. It forbids the running of the term of supervised release during any period in which the person is imprisoned. Joseph was in prison at the time he now seeks to identify as the beginning of his terms of supervised release and was, under the plain language of § 3624(e), ineligible for supervised release then. . . . [L]ike the Eighth Circuit in [*U.S. v. Douglas*, 88 F.3d 533, 534 (8th Cir. 1996)], we believe that the language in § 3624(e) must be given its plain and literal meaning."

The court also found defendant's arguments undermined by 18 U.S.C. § 3583(e), under which "a defendant can ask the district court to grant early termination of his supervised release terms 'in the interests of justice' after completing one full year of supervised release. . . . The availability of this mechanism, which will enable Joseph to argue whatever points of equity and fairness he thinks persuasive to the district court, further persuades us not to invent some form of automatic credit or reduction here to compensate for Joseph's increased incarceration."

*U.S. v. Joseph*, 109 F.3d 34, 36–39 (1st Cir. 1997).

See *Outline* generally at V.C

# Adjustments

## Obstruction of Justice

**Second Circuit examines when § 3C1.1 enhancement may be given for perjury during a related state investigation.** Defendant was convicted of environmental crimes. The district court found that, during a state investigation into the illegal waste dumping later prosecuted in federal court, defendant committed perjury. Concluding that defendant was aware of the federal investigation at that time and that it was the motivation for his perjury, the court imposed a § 3C1.1 enhancement for obstruction of

justice. Because "the connection between the two cases is quite close," the appellate court agreed that "here, perjury in the [state] action could constitute obstruction of justice in the instant federal offense."

However, the court concluded that the district court did not make adequate findings to show that defendant's perjury actually warranted enhancement. "[I]n order to base a § 3C1.1 enhancement upon the giving of perjured testimony, a sentencing court must find that the defendant 1) willfully 2) and materially 3) committed perjury, which is (a) the intentional (b) giving of false testimony (c) as to a material matter." The appellate court concluded that the district court did not sufficiently address the materiality elements. "We understand the materiality element to mean ordinarily that the intentional giving of false testimony must be material *to the proceeding in which it is given*. In other words, Herzog can be found to have committed perjury in the state proceeding only if the sentencing court finds that he intentionally gave false testimony which was material *to the state civil action*."

"This case presents an additional twist. Where, as here, the enhancement is applied based upon perjury made not in the instant judicial proceeding, but, rather, in a related but separate state action, we must assume that the element of materiality which is required by the Guidelines (as opposed to that required for a finding of perjury) must refer to a finding that the false testimony is material *to the instant action*. Just because perjured testimony is given in a related action, and simply because that testimony is found to have been material to the related proceeding, does not mean that the statements are material to the instant proceeding. We believe that, even if the court finds that Herzog's statements constituted perjury because they were material to the state proceeding, it must also find that the perjury was material to the instant federal offense before applying that state perjury as the basis for a § 3C1.1 enhancement of his federal sentence. We thus hold that, when false testimony in a related but separate judicial proceeding is raised as the basis for a § 3C1.1 obstruction of justice enhancement, a sentencing court may only apply the enhancement upon making specific findings that the defendant intentionally gave false testimony which was material to the proceeding in which it was given, that the testimony was made willfully, i.e., with the specific purpose of obstructing justice, and that the testimony was material to the instant offense."

"The sentencing court did not make findings with respect to either aspect of materiality. Although [it] found that the false state deposition was *motivated by* the instant federal offense, motivation alone does not equate to materiality. We therefore vacate Herzog's sentence and remand for additional findings."

*U.S. v. Zagari*, 111 F.3d 307, 328–29 (2d Cir. 1997).

See *Outline* at III.C.4 (State offenses)

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